TABLE OF CONTENTS

PAGE

STATEMENT 1

I. THE PROCEDURE SUGGESTED BY THE UNITED STATES MAY PREJUDICE APPELLANT HEREIN 3

II. RECENT DEVELOPMENTS 5

A. F.D. 21510 5

B. F.D. 23832 6

III. ECONOMIC AND FINANCIAL FACTS DEMONSTRATE THE COMMISSION ERRED IN FACT AND IN LAW 7

IV. THE IMPACT OF THE MERGER UPON COMMUNITIES SHOULD HAVE BEEN CONSIDERED BY THE COMMISSION 10

V. THE COMMISSION DOES NOT HAVE A SETTLED CONSTRUCTION OF THE PUBLIC INTEREST 12

APPENDIX 14

TABLE OF CASES

PAGE

Erie R. Co. Merger, 312 I.C.C. 185 (1960) 13

Great Northern Pacific & Burlington Lines, Inc.-Merger, Etc.-Great Northern Railway Company, et al. (Mimeo, 1966) 12

Louisville & N.R. Co. Merger, 295 I.C.C. 457 (1957).... 13

Missouri Pacific Railroad Company-Control-Chicago & Eastern Illinois Railroad Company (Mimeo, 1966).. 13

Norfolk & W. Ry. Co. Merger, 307 I.C.C. 401 (1960).... 13

Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co., Merger (F.D. 21510), 324 I.C.C. 1 (1964) 5, 13

Norfolk & Western Ry. Co.-Merger-Chesapeake & Ohio Ry. Co. (F.D. 23832) 6

New York Central Securities Corp. v. *United States*, 287 U.S. 12 (1932) 11, 13

Pacific Power & Light Co. v. *Federal Power Commission*, 111 F. 2d 1014 (1940) 12, 13

Seaboard Air Line R. Co.-Merger-Atlantic Coast Line, 320 I.C.C. 122 (1963) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CITY OF SCRANTON, et al.,

Appellants,

against

UNITED STATES OF AMERICA, et al.

Appellees.

On Appeal from the United States District Court for the Southern District of New York

REPLY TO MOTION TO AFFIRM AND REPLY BRIEF BY CITY OF SCRANTON

Statement

Appellant makes this reply to the Motion to Affirm of Greater Philadelphia Chamber of Commerce and the Chamber of Commerce of Greater Pittsburgh, to the briefs of the other appellees, and to the procedure suggested by the United States in the light of recent action by the Interstate Commerce Commission and a member thereof.

Appellee Interstate Commerce Commission and appellees Pennsylvania Railroad Company and New York Central Railroad Company claim that appellant lacks standing before this Court, but no motion is so presented. The Commission further challenges the integrity of appellant's contentions, complains that appellant's esteemed associate counsel has previously also represented other Pennsylvania communities,* but not Scranton, and otherwise voices displeasure that any community should be so bold as to stand against this proposed merger.

---

*Among them Lackawanna County.

There can be no legitimate challenge to appellant's standing. It was not contested in the district court, where appellant and seven other communities were intervenors in the action instituted by Erie-Lackawanna, appellant here in No. 691. The two additional carriers serving City of Scranton are both appellants. (No. 642 and No. 680)

There are hundreds of communities scattered through official territory that voiced opposition to the merger either by resolutions addressed to the agency or by entering formal appearances. (See: Recommended Report, pp. 229-286)

These communities are not an organized group and often do not have either the resources or the counsel versed in commerce law to engage in litigation of this nature before the Commission or the federal courts.

It cannot be inferred, as the Commission does repeatedly throughout its brief, that the failure of certain communities to pursue their legal remedies represents satisfaction with the proposed merger. On the contrary, the exact opposite must be presumed, and the shrill tone of the Commission's brief speaks for itself. Under the extraordinary circumstances presented herein, it would be eminently proper for this Court to consider appellant as but one of a class of numerous communities that will be adversely affected by the merger; and thereupon to consider the interest of all communities shown in the recommended report or in the two reports of the agency itself.*

The characterization by the Commission of City of Scranton's position throughout the case as "shifting" is untrue. Appellant is not merely concerned with preservation of the values of the securities issued by E-L, D&H and CNJ, all of which serve City of Scranton. The service rendered by these carriers, the employment by them of its citizens, the volume of freight passing through the area,

---

*See Joint Appendix for additional opposition. (J.A., E77-78)

and the present competition between the three railroads are all of importance to appellant.

The procedure adopted by the Commission in the pending unification proceedings has made appellant's position a most difficult one, since the adverse impact of inclusion of E-L and D&H into the N&W system as a direct result of the proposed PRR-NYC merger is not considered in the PRR-NYC case. Thus, the case-by-case approach of the Commission may reduce Scranton's competitive rail service from three to two lines as a direct result of a PRR-NYC merger. Yet Scranton fully appreciates the importance of a viable E-L and D&H, neither of which can survive a PRR-NYC merger. Similarly, the N&W-C&O merger, also proposed as a result of a PRR-NYC merger, would reduce competitive railroad service in that Scranton would have only one railroad, yet Scranton is in sympathy with the CNJ's position.

It is the failure of the Commission to so manage its proceedings as to consider the real adverse impact of the PRR-NYC merger which forces Scranton to be in outright opposition to the PRR-NYC merger. This is not unfair to the Commission because an administrative agency is bound in law to make its findings in accordance with the statutes, rather than in terms of how the parties raise certain issues.

The motion to affirm made by the Philadelphia and Pittsburgh Chambers of Commerce on the ground of unsubstantial questions should be denied. The substantiality of the questions presented is obvious.

I. THE PROCEDURE SUGGESTED BY THE UNITED STATES MAY PREJUDICE APPELLANT HEREIN.

The Memorandum of the United States, at several places, carefully refrains from making any comment upon

the issues presented by this appeal or No. 814.* In view of the fact that the United States may now wish to so state its views, and coupled with its position as an appellant before this Court, we deem it inappropriate at this time to speculate or otherwise anticipate that the United States will persist in its position that it does not quarrel with the merits of the Penn-Central merger proposal itself.

However, in not attacking the position of the United States at this time, since such position was not based upon all of the appeals, we do not wish to imply agreement with certain factual data assumed by the United States. Most important, the record fails to bear out that substantial railroad consolidations in the Northeast are necessary for the rapid modernization of the railroad plant as claimed by agencies of the Executive Branch. (Memo, pp. 21-22) The existence of economies of scale by large railroad mergers is contrary to studies made on this subject. The Commission stated that it had not studied this matter, except in one pending unification proposal that was subsequently denied by the agency.**

We suggest that the United States make available to the parties any Executive Branch studies purporting to show economies of scale from merger of large railroads in official territory, since great weight seems to have been given this point in its memorandum.

The procedure suggested by the United States, whereby this Court would continue its stay and hold the case for a reasonable time so as to permit the Commission to render its decision on further hearings in this proposed merger, as well as in a related unification case which was filed solely

---

*Memo, p. 2, fn. 1; p. 14, fn. 9; p. 17, fn. 11; p. 18, fn. 13.

**Hearings on S. 3097 before Senate Subcommittee on Antitrust & Monopoly, 87th Congress, 2d Sess., *Rail Merger Legislation*, pp. 448-451 (1962); Testimony concerning economies of scale is summarized in the Subcommittee report, *The Railroad Merger Problem*, 88th Congress, 1st Sess., pp. 55-65 (1963).

because of the PRR-NYC proposal, might prejudice appellant herein.

This prejudice might arise because the United States thereupon suggests that the case be returned to the district court, which has already ruled with respect to the merits of the merger. Thus, the procedure suggested by the United States might deny review on the merits of the merger by the Supreme Court, despite the October 18, 1966 *per curiam* opinion establishing procedure for review on the merits.

A more preferable procedure, if consolidation is deemed appropriate by this Court, is to remand this case now back to the Commission for reconsideration and further hearings in light of the related merger proceedings.

II. RECENT DEVELOPMENTS

The Commission has, since the filing of the jurisdictional statement by appellant on November 30, 1966, made public certain materials in two related cases. City of Scranton is a party to both proceedings.

A. *F.D. 21510*

Most of the appellees refer to the recommended report issued December 22, 1966, by Charles A. Webb, presiding as an examiner, in Finance Docket No. 21510, *Norfolk & W. Ry. Co. and New York C. & St. L.R. Co., Merger*, which involves the proposed forcible inclusion of E-L, D&H and B&M in the N&W system.

This report, although merely tentative and subject to exceptions, replies and full review by the Commission itself, is a powerful document offering support for consolidation of the PRR-NYC merger case with the N&W inclusion case. This is because of the conceeded interrelated nature of the two cases (Rec. Rep., sheets 13-14 and 23-24), the necessity for the recommended report to infer new conclusions by the Commission in the PRR-NYC case now

before this Court which are not embraced in the matters presently under reconsideration by the Commission (Rec. Rep., pp. 26-28) and, of importance to Scranton and its surrounding area, the finding that the proposed loss of competition between E-L and D&H in coming under the control of N&W is not substantial because it would provide increased competition for the proposed PRR-NYC system. (Rec. Rep., pp. 31-32) In thus using the PRR-NYC merger to justify a reduction in competition between E-L and D&H, the Commission in its case-by-case approach will evade the full anti-competitive effect of the proposed PRR-NYC merger, since the inclusion case arises solely because of PRR-NYC.

B. *F.D.* 23832

The full Commission, on December 30, 1966, reversed itself in Finance Docket No. 23832, *Norfolk & Western Ry. Co.-Merger-Chesapeake & Ohio Ry. Co.* That proceeding involves the proposed N&W-C&O merger. The Commission will now permit hearings under a procedure which will not intertwine the case with F.D. 21510. The earlier order is reproduced as an appendix to the Memorandum of the United States in Nos. 642, 680 and 691. Inasmuch as City of Scranton and the surrounding Lackawanna County area are served by E-L, D&H and CNJ, favorable action in F.D. 21510 would mean that competition rail service would be reduced from three lines to two lines, whereas favorable action in F.D. 23832 would mean that the remaining two lines would be reduced to a single line.

In outlining these recent developments, appellant does not suggest that it prefers a remand of this case to the Commission for consolidation with the two related dockets. Rather, appellant believes that the Commission's orders in the PRR-NYC case should be annulled and set aside on the merits and on the record before this Court, and that no amount of patchwork by the Commission can make the merger consistent with the public interest.

III. ECONOMIC AND FINANCIAL FACTS DEMONSTRATE THE COMMISSION ERRED IN FACT AND IN LAW.

None of the appellees challenges the forecasts as to U. S. economic growth, traffic carriage by the two roads, and incomes of the two roads, as presented by Mr. Keyserling in early 1963. Nor could they challenge these forecasts, for as of 1965 and 1966 they have turned out to be *exactly* correct as to traffic, and conservative in other respects.

But more important, appellant's economic case need not now rest primarily upon the accuracy of Keyserling's forecasts. The case as of now rests basically, not upon any discretionary choice by the Commission among varying earlier forecasts, but rather upon the Commission's failure to give any weight to the facts as they actually were when the two reports of the Commission were issued in 1966. Thus, the Commission's decision was "unsupported by substantial evidence." For this reason, there is no merit in the argument that this Court should not substitute its judgment for that of the Commission, contending that this matter is within the discretion of the Commission. (ICC Br., pp. 84-85) The contention of appellant is not merely that the Commission exercised faulty judgment, but primarily that it completely dismissed the actual facts before it in early 1966. Moreover, a Commission which continued irrationally and arbitrarily to rely upon forecasts from 1961 through 1970 which had turned out to be diametrically opposed to reality as of 1966, can hardly claim expertise in forecasting developments 1967-1970 on the basis of adherence to the very methods of forecasting which had proven so wrong by September 16, 1966.

To be sure, the Commission did say that the significance of the facts actually before it might be negated in the future by a serious downturn in the business cycle. In doing this, the Commission committed a second fatal error of law,

because it substituted its own concept of boom-and-bust for the oft-declared policy of the Congress requiring that railroad facilities be budgeted to serve adequately the needs of a stable and growing economy.

The Commission based its decision upon forecasts that the U. S. rate of economic growth would average annually only 3 percent from 1961 through 1970, and far less than this in the Eastern District. (J.A. A11) But when it approved the merger in 1966, the Commission *knew* that the actual growth rate from 1961 through 1965 had averaged 5.4 percent, or 80 percent higher than the 3 percent forecast.

The Commission founded its two decisions in 1966 upon a forecast that revenue ton miles carried by Penn and Central would decline 6.5 percent by 1965, and 9.2 percent by 1970. (J.A., B—Chart 10) But when the Commission decision was issued in 1966, the Commission *knew* that actual ton miles carried by the two roads in 1965 was 22 percent above 1961. The estimated carriage by the two roads in 1966 was 43 percent higher than the forecast used by the Commission for 1970. (Appendix herein)

The Commission acted upon the forecast, based upon a combined after-tax income for the two roads of minus 9.0 million dollars in 1961, that "their financial condition, barring substantial reductions in cost, will deteriorate further." (Rec. Rep., p. 211) But the actual after-tax net income of the two roads was 75.4 million dollars in 1965, *prior* to the Commission's decision, and is estimated at 100 million in 1966. Consolidated after-tax income was 122.5 million in 1965. Cash flow, more important than net income in determining financial viability and investment capabilities, was 166.4 million in 1965, and is estimated at about 190 million for 1966.

In neglecting these facts before it, the Commission not only closed its eyes to the very facts upon which the Com-

mission itself stated the issue of merger turned, accepting instead forecasts which had already turned out to be egregiously wrong. The explanation which the Commission offered for doing this—that economic downturns subsequent to 1965 might subsequently validate the forecasts which had turned out to be egregiously wrong and erase the significance of the facts actually before it—involved a clear substitution of Commission policy for the policy enunciated by the Congress. The Commission predicated its decision upon the concept of boom-and-bust, while the relevant legislation requires that transportation facilities be budgeted to the requirements of a stable and growing economy. In order that the forecasts upon which the Commission acted might be vindicated, traffic carried by the two roads would need to decline *30 percent* from 1966 to 1970. This could occur only in the event of a nationwide economic calamity so severe as to wreck us both at home and overseas, and exceeding in pace the decline which took place from 1929 to 1933.

The Commission did not deny that the merger would grossly reduce competition. It overrode this consideration on the ground that the financial condition of the two roads and the financial outlook for them was so critical that the public interest required the savings to be achieved through very large downward budgeting of facilities and services. But the whole range of forecasts upon which these conclusions were reached had vanished into thin air when the Commission rendered its decisions in 1966.

It is now claimed that the merger is needed to support modernization. But the very fact that the two roads have been able to increase their traffic carriage by 25 percent from 1961 to 1966 proves that they did not need a merger based upon the opposite hypothesis that their traffic would decline greatly. Both internal and external funds in support of modernization are now abundantly available to the two roads. Modernization will be quickened by effective

competition between the two roads, and stultified by their merger.

The two roads and the Commission insist that the merger would strengthen the capacity of the two roads to engage in intermodal competition. But efficient intermodal competition depends first of all upon the two roads sharpening their performance by effective competition with each other.

The evidence to date is that the difficulties in which the two roads have found themselves thus far have been caused more by their becoming too swollen rather than because they have been too small. As the mergers and acquisitions, including nonrailroad properties which they have effectuated in the past have not in their own eyes solved their difficulties, they cannot solve them through more of the same. Indeed, the serious decline in traffic carriage and income on the two roads during 1953-1961 was due in large measure to their downward budgeting of facilities and services and their maintenance of excessively high charges per unit, both reflecting their restrictionist propensities. The merger proposal has represented an effort to apply the same prescription in future. It would therefore be hurtful to the two roads as well as to the general public.

IV. THE IMPACT OF THE MERGER UPON COMMUNITIES SHOULD HAVE BEEN CONSIDERED BY THE COMMISSION.

Applicants, Commission and State of New York all argue that the Commission need not consider the adverse impact of the merger upon City of Scranton and other communities with respect to taxation, employment and the effect upon individual businesses located therein.

The Commission notes the interest of appellant in railroad employment (ICC Br. 81, fn. 21), but does not answer the matters raised by the appeal herein, and in No. 814, that the Commission erred as a matter of law in not

considering railroad employment on carriers affected by the merger as required by Section 5(2)(c)(4) of the Act or in not imposing protective conditions as provided for by Section 5(2)(f). (No. 813, J.S., p. 20; No. 814, Br., pp. 22-24; J.A., E, pp. 55-57) However, applicants rely on the absence of railroad labor representatives before this Court as a "decisive refutation" of this argument (App. Br., p. 79), and State of New York asserts that no protective conditions were sought by such employees or their representatives. (NYS Br., pp. 11-12)

City of Scranton has an obvious interest in rail employment and despite the lack of active opposition to the merger by labor representatives subsequent to their 1964 agreement with applicants, counsel for the Railway Labor Executives Association and International Association of Machinists did appear at the oral argument held October 21, 1965, before the entire Commission in this case. Counsel for these employees made a brief argument requesting the Commission to consider the interest of employees on carriers such as E-L, D&H, and CNJ in passing upon the merger pursuant to Section 5(2)(c)(4), and, further, to impose protection under Section 5(2)(f). The pertinent text of this argument is in appellant's joint appendix. (J.A., E, pp. 55-57)

Applicants, Commission and State of New York also rely heavily upon the "public interest" as defined by *New York Central Securities Corp.* to exclude the adverse impact upon communities from consideration. (App. Br., pp. 68-71; ICC Br. 19, 88-90; NYS Br., pp. 11-14) The contentions of appellant would be merely repetitious at this point. (See: No. 813, J.S., pp. 18-20; Br., pp. 7-10; No. 814, pp. 5-6, 8; Br., pp. 19-30; J.A., A1-2, C1-4, D3-6, E36-54)

The Commission and PRR-NYC also imply that the general findings with respect to Pennsylvania should cover all the communities in the Commonwealth (ICC Br., 87-88; App. Br., p. 71, fn. 31) But this cannot be inferred from the actual finding. Of considerable importance in this re-

gard is the failure of the Commission to be even aware of six communities which filed pleadings or to the correct position of the Commonwealth at that time, (J.A., E77-78) Further, the "finding" as to Pennsylvania can by no means be considered as supported by substantial evidence. (J.A., E80-83)

V. THE COMMISSION DOES NOT HAVE A SETTLED CONSTRUCTION OF THE PUBLIC INTEREST.

The Commission states that its own "settled pattern of construction" of the "public interest" should be given weight by this Court. (ICC Br., 89-90) However, the Commission has not maintained a consistent construction of the "public interest" requirement of Section 5(2)(b), and much uncertainty exists which apparently can only be resolved by the courts. Two different legal tests are in current vogue with the Commission. One test is that set forth in *Pacific Power & Light Co.* v. *Federal Power Commission*, 111 F. 2d 1014 (1940). This test holds that "consistent with the public interest" means a negative not contradictory or hostile to the public interest, and, specifically, does not connote any public benefits to be derived from the proposed transaction. The test has been employed by the Commission in three railroad unification proceedings. *Chesapeake & O. Ry. Co.-Control-Baltimore & O.R. Co.*, 317 I.C.C. 261, 285 (1962); *Seaboard Air Line R. Co.-Merger-Atlantic Coast Line*, 320 I.C.C. 122, 130 (1963); *Great Northern Pacific & Burlington Lines, Inc.-Merger, Etc.-Great Northern Railway Company, et al.* (Mimeo, sheets 65-67, 87-92)

The "not contradictory or hostile" construction of the public interest has been challenged as erroneous because it derives from the Federal Power Act and, further, at a time prior to the enactment of the National Transportation Policy. (J.A., E44) The test in reality places the burden

upon protestants to show why a merger should not be approved.

The other test used by the Commission is the *New York Central Securities Corp.* test without any negative implications, and in the PRR-NYG case, reference to "public benefits." *Louisville & N.R. Co. Merger*, 295 I.C.C. 457, 502-3 (1957); *Norfolk & W. Ry. Co. Merger*, 307 I.C.C. 401, 440 (1960); *Erie R. Co. Merger*, 312 I.C.C. 185, 246 (1960); *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 324 I.C.C. 1, 18 (1964); *Missouri Pacific Railroad Company-Control-Chicago & Eastern Illinois Railroad Company* (Mimeo Sheet 25).

The above recent cases shown as following either the *Pacific Power & Light Co.* or the *New York Central Securities Corp.* test illustrate that there is confusion as to the proper definition of the public interest. Although this Court established guidelines in its 1944 opinion in *McLean*, the Commission has failed to apply a correct construction of the public interest or to even be consistent in its application thereof.

Respectfully submitted,

GORDON P. MACDOUGALL,
705 Ring Building,
Washington, D. C. 20036

LEON H. KEYSERLING,
1001 Connecticut Ave., N.W.
Washington, D. C. 20036

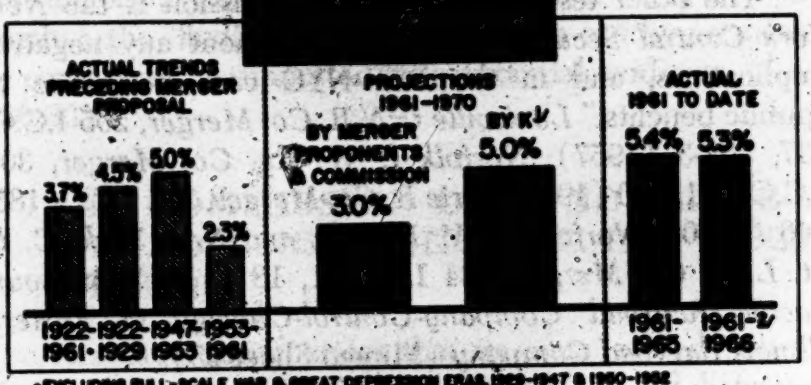
Attorneys for Appellant,

HARVEY GELB,
City Hall,
Scranton, Pa. 18503,
Of Counsel.

January 6, 1966.

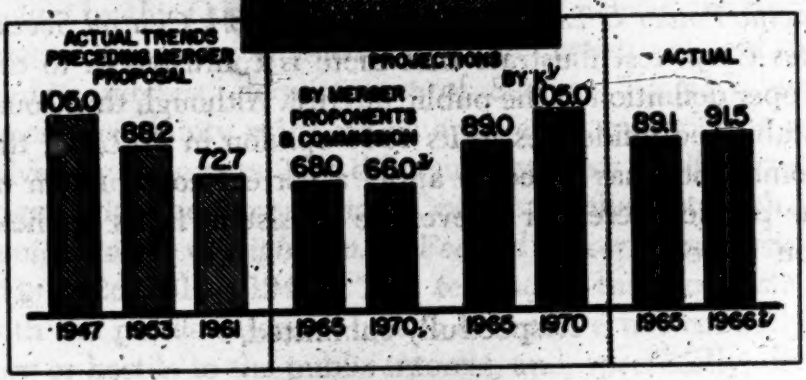
APPENDIX

[redacted]

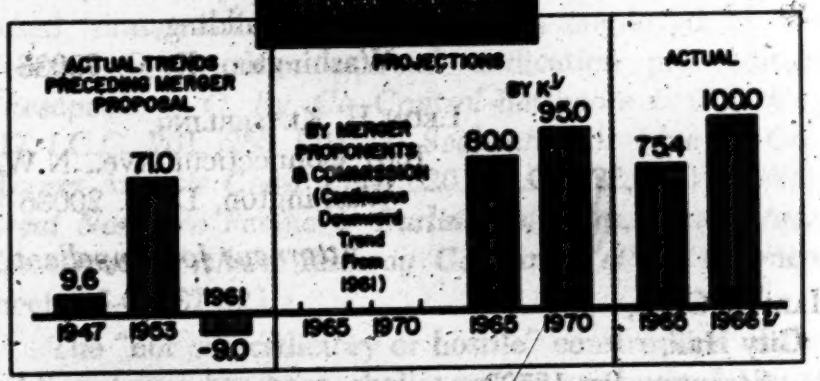


*EXCLUDING FULL-SCALE WAR & GREAT DEPRESSION ERAS, 1929-1947 & 1950-1952

[redacted]



[redacted]



1/ Leon H. Keyserling, in testimony before ICC Examiners in early 1963.

2/ Full year 1966 estimate based upon first three quarters.

3/ $4.0 billion by ICC Examiners, accepted by Commission.

Source for actual data: Department of Commerce; I C C Transport Statistics; for projections, ICC record.